

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)	SUMMARY OF FACTS
Complaint Against)	AND
Ellycia "Lish" Taapken)	STATEMENT OF FINDINGS

James S. "Jim" Hamman, independent candidate for Jefferson County Sheriff, filed a complaint against Ellycia Taapken. Hamman alleges that Taapken violated 13-35-235, Montana Code Annotated (MCA) by making false statements reflecting negatively on his character and morality.

SUMMARY OF FACTS

1. Hamman was an independent candidate for Jefferson County Sheriff in the 1994 election.

2. Taapken was a candidate for the Jefferson County Study Commission and was campaigning door-to-door for Jefferson County Sheriff Candidate Daryl Craft.

3. Hamman alleges that while Taapken was campaigning and speaking to the Johnson brothers, James L. and John S., she made false statements that reflected on his character and morality and urged them not to vote for Hamman.

4. Taapken made several statements about Hamman expressing reservations about his candidacy. She cited his dropping out of the race for sheriff in the 1986 campaign for Sheriff of Jefferson County as an example of him not following through. Taapken was also concerned about Hamman collecting disability and working on his house at the same time. This was "fraud" and she did not want him as sheriff.

5. Both Johnson brothers believed that Taapken's statements indicated that Hamman was somehow breaking the law and that his character was less than reputable.

6. Hamman suffered an injury due to a work-related accident on July 7, 1987, which required surgery on his knee on August 5, 1987. As a result the physician could not certify him for duty as a police officer for the Helena Police Department. A disability pension from the Public Employees Retirement System became effective on August 11, 1988 and remains in effect. The doctor requires Hamman to exercise his knee to maintain flexibility and Hamman believes he is following doctor's orders by staying active and working on construction tasks.

7. Hamman has been working on construction of a house on his Lump Gulch property.

8. Taapken believes that Hamman was not physically fit and that he was misrepresenting himself as being up to the tasks of sheriff when the medical doctor was not able to certify him for patrol duty with the Helena Police Department.

9. Taapken denies that she made a false statement reflecting on Jim Hamman's character.

STATEMENT OF FINDINGS

Section 13-35-234, MCA, Montana's political criminal libel statute provides:

Political criminal libel - misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a

statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

The evidence clearly supports a finding that Taapken stated that Hamman was committing "fraud" and in her view was not a fit candidate to be elected sheriff. Her choice of the word "fraud" to describe Hamman's working on his house while drawing payment from a disability pension clearly led the Johnsons to believe that her statement indicated Hamman was doing something wrong, getting money for something he wasn't due, or engaged in an illegal act. The Johnsons inferred that his physical problems are not as bad as portrayed and a scam of sorts was going on. Jim Johnson stated, "My interpretation after hearing the comments was that Hamman's character was suspect." Use of the word "fraud" was careless at best and did not produce the notion intended in her statement in this investigation.

Section 13-35-234, MCA, prohibits a misrepresentation made "with knowledge of its falsity." In determining whether a misrepresentation was made "knowingly" or "with knowledge," it would be necessary to prove that Taapken was "aware of a high probability" that the representation was false. Taapken's explanation of her comments denies that she misrepresented the truth. She insists that she was stating her opinion that Hamman, being a disabled police officer, yet able to physically accomplish house construction tasks, wouldn't be her choice for sheriff. She

believed that Hamman, while on disability pension, gave the appearance of working in a physically demanding job bringing to her mind a question about his disability. This inconsistency between not being physically able to perform as an officer for the Helena Police Department, yet being able to erect trusses on his house brought his ability to meet the demands as sheriff into question in Taapken's thinking. Her opinion and support of candidate Craft was guided by her concerns about Hamman's seeming lack of physical qualifications to perform the tasks associated with being sheriff. The "fraud" charge caused the Johnsons to interpret her statements in a way she did not intend. When referring to "fraud" she claimed that Hamman was misrepresenting himself as being fit when in fact he was not certifiable for police work. She believed she didn't reflect on Hamman's character or morality, but was merely stating her opinion that he was not a good choice for sheriff of Jefferson County.

The question of whether Taapken made a false statement is difficult since she used the word "fraud" in connection with the activities of Hamman. While in Taapken's mind there existed a dissonance between the disability for duty as a Helena police officer, the ability to construct a house, and the need for a sheriff who can perform physical tasks to meet the needs of Jefferson County residents, there was certainly nothing illegal in Hamman's activities. The impression created is at best unfortunate with the careless use of the word "fraud." Nonetheless, Taapken, in expressing her opinion about the candidacy of Hamman, was

referring to the seeming misrepresentation she felt Hamman was using when he presented himself as fit to the physical tasks required of a sheriff in Jefferson County while drawing disability payments from his injury while on duty as a police officer. In the interview she stated that foot pursuit of a recent escapee would require a sheriff to be physically able to participate. In her view Hamman would not be up to the task and she was expressing this view when she chose the word "fraud" to indicate that he was misrepresenting his abilities in his campaign for sheriff.

A person making a false statement reflecting on a candidate's character or morality with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor. While the statement by Taapken was unfortunate and careless, in her mind she was speaking against Hamman's candidacy based on his physical qualifications, which do include an inability to be certified by medical authorities for duty as a patrol officer for the Helena Police Department. This fact gave enough credence in Taapken's view to speak forcefully against Hamman's candidacy. She believed he lacked the qualifications to be an effective sheriff and came within a breath of violating the statute. However, given the facts, it appears that the statement was made based on facts she felt were relevant and true and didn't have anything to do with Hamman's character or morality, but everything to do with his fitness for sheriff. The requisite mental state simply does not exist to prove that Taapken made a false statement knowingly or with reckless disregard. It is my conclusion that the

statement was "careless" and perhaps even "negligent," however, 13-35-101, MCA, states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Section 45-2-101 (33), MCA, defines "knowingly" as follows:

. . . (A) person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Section 13-35-234, MCA, prohibits a representation made "with knowledge of its falsity." In determining whether a misrepresentation was made "knowingly" or "with knowledge," it would be necessary to prove that Taapken was "aware of a high probability" that the representation was false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard." The Compiler's Comments to 13-35-234, MCA, note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)." That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice," that is, with

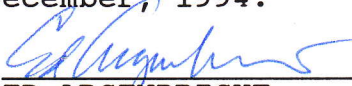
"knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of this publications." The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57. Other cases have held that "reckless disregard" is "more than mere negligence," Major v. Drapeau, 507 A.2d j938, 941 (R.I. 1986); and that "a failure to investigate is not sufficient in itself to establish reckless disregard," Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 742 (Alaska 1982), the Court observed:

Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. (citation omitted). There must be sufficient evidence to permit the inference that the defendant must have, in fact, subjectively entertained serious doubts as to the truth of his statement.

Applying these principles to the facts of this case, the evidence does not support a finding that Taapken violated 13-35-234, MCA, when she used careless language in stating her opinion about Hamman's candidacy.

DATED this 14th day of December, 1994.



ED ARGENBRIGHT
Commissioner of Political Practices